MONTANA LEGISLATIVE HISTORY

Chapter 426 19 83

Bill H _____ S 237 Original bill & history X C

H. Committee on JUDICIARY			S. Committee on JUDICIARY		
Hearing Date(s)	3/21	X C	Hearing Date(s)	2/1	X C
EXEC. ACTION	3/22	X C		2/9	X C
		C			C
		C			C
Date Out		C			

Did this bill originate in an interim committee? ____Yes ____No

Committee _____ Report _____

REFERRED TO COMMITTEE ON PUBLIC HEALTH, WELFARE, & SAFETY: 01/20/83
HEARING: 2/4/83
REPORT: 02/07/83, DO PASS
2ND READING: 02/09/83 AYES: 49; NAYS: 0
3RD READING: 02/11/83 AYES: 48; NAYS: 2

TRANSMITTED TO HOUSE: 2/11/83
REFERRED TO COMMITTEE ON APPROPRIATIONS: 02/12/83
HEARING: 4/7/83
REPORT: 4/7/83, BE CONCURRED IN
2ND READING: 04/08/83, BE CONCURRED IN AYES: 94; NAYS: 3
3RD READING: 04/11/83, BE CONCURRED IN AYES: 70; NAYS: 10

RETURNED TO SENATE: 4/11/83

TRANSMITTED TO GOVERNOR: 04/15/83
SIGNED: 4/19/83, CHAPTER 587

SB 233 -- MARBUT, DOVER, STORY, ET AL. -- REQUIRING LOCAL GOVERNMENTAL BODIES TO ESTABLISH WEED CONTROL PROGRAMS BEFORE ACCEPTING DEDICATED PARKS ....

INTRODUCED: 01/20/83
REFERRED TO COMMITTEE ON AGRICULTURE, LIVESTOCK, & IRRIGATION: 01/20/83
HEARING: 1/26/83
DIED IN COMMITTEE

SB 234 -- MARBUT, EUDAILY, HALLIGAN, ET AL. -- REVISING THE PROCESS TO ALTER OR ABANDON A COUNTY ROAD; REQUIRING A PUBLIC HEARING WHEN ALTERATION OR ABANDONMENT OF A PUBLIC ROAD IS PROPOSED ....

INTRODUCED: 01/20/83
REFERRED TO COMMITTEE ON LOCAL GOVERNMENT: 01/20/83
HEARING: 1/27/83
REPORT: 02/03/83, DO NOT PASS. REPORT ADOPTED.
BILL KILLED.

SB 235 -- HAFFEY, DONALDSON, VAN VALKENBURG, ET AL. -- TO CLARIFY THE INFORMATION REQUIRED TO BE SUBMITTED TO THE BUDGET DIRECTOR AND THE LEGISLATIVE FISCAL ANALYST FOR THE PREPARATION OF AGENCY BUDGET ESTIMATES ....
BY REQUEST OF: THE LEGISLATIVE FINANCE COMMITTEE

INTRODUCED: 01/20/83
REFERRED TO COMMITTEE ON STATE ADMINISTRATION: 01/20/83
HEARING: 1/27/83
REPORT: 02/01/83, DO PASS, AS AMENDED
2ND READING: 02/03/83 AYES: 50; NAYS: 0
3RD READING: 02/05/83 AYES: 46; NAYS: 0

TRANSMITTED TO HOUSE: 2/5/83
REFERRED TO COMMITTEE ON APPROPRIATIONS: 02/07/83
2ND READING: 03/28/83, BE CONCURRED IN AYES: 95; NAYS: 0
3RD READING: 03/28/83, BE CONCURRED IN AYES: 93; NAYS: 1

RETURNED TO SENATE WITH AMENDMENTS: 3/29/83
2ND READING: 04/08/83, BE NOT CONCURRED IN AYES: 48; NAYS: 0

CONFERENCE COMMITTEE APPOINTED: 4/12/83

CONFERENCE COMMITTEE DISSOLVED: 04/15/83

FREE CONFERENCE COMMITTEE APPOINTED: 04/15/83

FREE CONFERENCE COMMITTEE REPORT: 04/18/83

SENATE
2ND READING: 04/19/83, BE ADOPTED AYES: 50; NAYS: 0
3RD READING: 04/20/83, BE ADOPTED AYES: 46; NAYS: 0

HOUSE
2ND READING: 04/18/83, ADOPTED AYES: 97; NAYS: 1
3RD READING: 04/18/83, ADOPTED AYES: 98; NAYS: 2

TRANSMITTED TO GOVERNOR: 4/21/83
SIGNED: 4/28/83, CHAPTER 666

SB 236 -- CRIPPEN -- TO ADD TO THE LIST OF ITEMS THAT MAY BE FORFEITED WHEN USED IN CONNECTION WITH A VIOLATION OF THE DANGEROUS DRUGS LAWS ....

INTRODUCED: 01/20/83
REFERRED TO COMMITTEE ON JUDICIARY: 01/20/83
HEARING: 1/28/83
REPORT: 02/02/83, DO PASS, AS AMENDED
2ND READING: 02/05/83 AYES: 47; NAYS: 0
3RD READING: 02/08/83 AYES: 48; NAYS: 2

TRANSMITTED TO HOUSE: 2/8/83
REFERRED TO COMMITTEE ON JUDICIARY: 02/09/83
HEARING: 3/9/83
REPORT: 03/09/83, BE CONCURRED IN
2ND READING: 03/10/83, BE CONCURRED IN AYES: 92; NAYS: 2
3RD READING: 03/11/83, BE CONCURRED IN AYES: 96; NAYS: 3

RETURNED TO SENATE: 3/11/83

TRANSMITTED TO GOVERNOR: 03/18/83
SIGNED: 3/23/83, CHAPTER 180

SB 237 -- HALLIGAN, ASAY, SWIFT, ET AL. -- TO PROVIDE A PROCEDURE FOR RESTITUTION TO VICTIMS OF CRIMES BY THE CRIMINAL OFFENDERS AND A PROCEDURE UPON DEFAULT IN PAYMENT OF RESTITUTION.

INTRODUCED: 01/20/83
REFERRED TO COMMITTEE ON JUDICIARY: 01/20/83
HEARING: 2/1/83
REPORT: 02/10/83, DO PASS, AS AMENDED
2ND READING: 02/12/83 AYES: 48; NAYS: 0
3RD READING: 02/15/83 AYES: 49; NAYS: 0

TRANSMITTED TO HOUSE: 2/15/83
REFERRED TO COMMITTEE ON JUDICIARY: 03/01/83
HEARING: 3/21/83
REPORT: 03/22/83, BE CONCURRED IN, AS AMENDED
2ND READING: 03/23/83, BE CONCURRED IN AYES: 70; NAYS: 0
3RD READING: 03/25/83, BE CONCURRED IN AYES: 94; NAYS: 0

RETURNED TO SENATE WITH AMENDMENTS: 3/26/83
2ND READING: 04/01/83 AYES: 46; NAYS: 0
3RD READING: 04/04/83 AYES: 45; NAYS: 0

TRANSMITTED TO GOVERNOR: 04/9/83
SIGNED: 4/12/83, CHAPTER 426

SB 238 -- OCHSNER, MC CALLUM, HOLLIDAY, ET AL. -- TO GENERALLY REVISE THE LAWS RELATING TO THE REGULATION OF THE SALE AND USE OF PESTICIDES....
BY REQUEST OF: THE DEPARTMENT OF AGRICULTURE

INTRODUCED: 01/21/83
REFERRED TO COMMITTEE ON AGRICULTURE, LIVESTOCK, & IRRIGATION: 01/21/83
HEARING: 2/2/83
REPORT: 02/11/83, DO NOT PASS
ON MOTION, 2/12/83, THAT THE BILL BE RECONSIDERED. MOTION PASSED.
REFERRED TO COMMITTEE ON AGRICULTURE, LIVESTOCK, & IRRIGATION: 02/12/83
HEARING: 2/16/83
ON MOTION, 2/21/83, THAT THE BILL BE PRINTED AND PLACED ON 2ND READING. MOTION FAILED BY THE FOLLOWING VOTE: AYES: 25; NAYS: 25.
BILL KILLED.

SB 239 -- KEATING, CRIPPEN, LEE -- PROVIDING FOR FULL CONTROL AND MANAGEMENT OF MUNICIPAL PUBLIC TRANSPORTATION SERVICES AND TRANSPORTATION DISTRICT SERVICES BY THE MUNICIPALITY OR DISTRICT....

INTRODUCED: 01/21/83
REFERRED TO COMMITTEE ON HIGHWAYS & TRANSPORTATION: 01/21/83
HEARING: 1/27/83
REPORT: 01/27/83, DO PASS
2ND READING: 01/29/83 AYES: 46; NAYS: 0
3RD READING: 02/01/83 AYES: 48; NAYS: 0

TRANSMITTED TO HOUSE: 2/1/83
REFERRED TO COMMITTEE ON HIGHWAYS & TRANSPORTATION: 02/02/83
HEARING: 3/8/83
REPORT: 03/08/83, BE CONCURRED IN
2ND READING: 03/09/83, BE CONCURRED IN AYES: 87; NAYS: 2
3RD READING: 03/10/83, BE CONCURRED IN AYES: 97; NAYS: 0

RETURNED TO SENATE: 3/10/83

TRANSMITTED TO GOVERNOR: 03/18/83
SIGNED: 03/22/83, CHAPTER 160

SB 240 -- MC CALLUM, E. SMITH, OCHSNER, ET AL. -- TO ALLOW THE TRUSTEES OPERATING A POSTSECONDARY VOCATIONAL-TECHNICAL CENTER TO INCLUDE IN THE PROPOSITION FOR AN ADDITIONAL LEVY IN SUPPORT OF THE CENTER FINANCING FOR SALARIES, BENEFITS, OPERATIONS, AND EQUIPMENT ....
BY REQUEST OF: THE LEGISLATIVE FINANCE COMMITTEE

INTRODUCED: 01/21/83
REFERRED TO COMMITTEE ON EDUCATION & CULTURAL RESOURCES: 01/21/83
HEARING: 1/31/83
REPORT: 02/01/83, DO PASS
2ND READING: 02/03/83 AYES: 50; NAYS: 0
3RD READING: 02/05/83 AYES: 46; NAYS: 0

TRANSMITTED TO HOUSE: 2/5/83
REFERRED TO COMMITTEE ON EDUCATION & CULTURAL RESOURCES: 02/07/83
HEARING: 3/2/83
REPORT: 03/02/83, BE CONCURRED IN, AS AMENDED
2ND READING: 03/04/83, BE CONCURRED IN AYES: 87; NAYS: 3
3RD READING: 03/07/83, BE CONCURRED IN AYES: 86; NAYS: 9

RETURNED TO SENATE WITH AMENDMENTS: 3/8/83
2ND READING: 03/09/83 AYES: 50; NAYS: 0
3RD READING: 03/10/83 AYES: 48; NAYS: 0

TRANSMITTED TO GOVERNOR: 03/18/83
SIGNED: 03/22/83, CHAPTER 161

SB 241 -- LEE, FABREGA, KOLSTAD, ET AL. -- TO GENERALLY REVISE THE TAX CREDIT AVAILABLE FOR NEW OR EXPANDING INDUSTRY; ... AND PROVIDING AN APPLICABILITY DATE.

INTRODUCED: 01/21/83
REFERRED TO COMMITTEE ON TAXATION: 01/21/83
HEARING: 2/8/83
REPORT: 03/01/83, DO PASS, AS AMENDED
2ND READING: 03/03/83 AYES: 38; NAYS: 11
3RD READING: 03/04/83 AYES: 39; NAYS: 7

TRANSMITTED TO HOUSE: 3/4/83
REFERRED TO COMMITTEE ON TAXATION: 03/07/83
HEARING: 3/14/83
DIED IN HOUSE COMMITTEE

SB 242 -- GAGE, TOWE -- TO GENERALLY REVISE AND CLARIFY LAWS PERTAINING TO INCOME TAXATION OF ESTATES, PROPERTY HELD IN TRUST, AND BENEFICIARIES OF ESTATES OR TRUSTS; PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE.
BY REQUEST OF: THE REVENUE OVERSIGHT COMMITTEE

INTRODUCED: 01/21/83
REFERRED TO COMMITTEE ON TAXATION: 01/21/83
HEARING: 2/3/83
REPORT: 02/17/83, DO PASS, AS AMENDED
2ND READING: 02/19/83 AYES: 48; NAYS: 0
3RD READING: 02/22/83 AYES: 49; NAYS: 0

TRANSMITTED TO HOUSE: 02/22/83
REFERRED TO COMMITTEE ON TAXATION: 02/26/83
HEARING: 3/10/83
REPORT: 03/11/83, BE CONCURRED IN
2ND READING: 03/14/83, BE CONCURRED IN AS AMENDED AYES: 91; NAYS: 0
3RD READING: 03/15/83, BE CONCURRED IN AYES: 95; NAYS: 0

RETURNED TO SENATE WITH AMENDMENTS: 3/16/83
2ND READING: 03/17/83 AYES: 48; NAYS: 0
3RD READING: 3/18/83 AYES: 50; NAYS: 0

TRANSMITTED TO GOVERNOR: 03/24/83
SIGNED: 3/30/83, CHAPTER 260

SB 243 -- TOWE -- TO PROVIDE FOR A 5-YEAR STATUTE OF LIMITATIONS FOR TAXES ON CENTRALLY ASSESSED PROPERTY, COAL SEVERANCE TAXES, OIL AND GAS SEVERANCE TAXES, MINING

SENATE BILL NO. 237

INTRODUCED BY HALLIGAN, ASAY,
SWIFT, HANNAH, BOYLAN, ECK

IN THE SENATE

January 20, 1983	Introduced and referred to Committee on Judiciary.
February 10, 1983	Committee recommend bill do pass as amended. Report adopted.
February 11, 1983	Bill printed and placed on members' desks.
February 12, 1983	Second reading, do pass.
February 14, 1983	Correctly engrossed.
February 15, 1983	Third reading, passed. Ayes, 49; Noes, 0. Transmitted to House.

IN THE HOUSE

March 1, 1983	Introduced and referred to Committee on Judiciary.
March 22, 1983	Committee recommend bill be concurred in as amended. Report adopted.
March 23, 1983	Second reading, concurred in.
March 25, 1983	Third reading, concurred in.

IN THE SENATE

March 26, 1983	Returned to Senate with amendments.
April 1, 1983	Second reading, amendments concurred in.

April 4, 1983	Third reading, amendments concurred in. Ayes, 45; Noes, 0.
	Sent to enrolling.
	Reported correctly enrolled.

Senate BILL NO. 237

INTRODUCED BY Gallagher, Casey, Smith, Harrell, Boylan, Eck

A BILL FOR AN ACT ENTITLED: "AN ACT TO PROVIDE A PROCEDURE FOR RESTITUTION TO VICTIMS OF CRIMES BY THE PERPETRATORS OF CRIMES AND A PROCEDURE UPON DEFAULT IN PAYMENT OF RESTITUTION."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Sentence of restitution. As provided in 46-18-201, a sentencing court may sentence an offender to make restitution to any victim of the offense. An insurer or surety that has paid any part of a victim's pecuniary loss is not a victim for purposes of obtaining restitution.

Section 2. Investigation and report of victim's loss. Whenever the court believes that restitution may be a proper sentence or the victim of the offense or the prosecuting attorney requests, the court shall order a presentence investigation and report by a probation officer documenting the nature and amount of the victim's pecuniary loss.

Section 3. Definition. For purposes of [sections 1 through 9], "pecuniary loss" means:

(1) all special damages, but not general damages, substantiated by evidence in the record, that a person could recover against the offender in a civil action arising out of the facts or events constituting the offender's criminal activities, including without limitation the money equivalent of loss resulting from property taken, destroyed, broken, or otherwise harmed and out-of-pocket losses, such as medical expenses; and

(2) reasonable out-of-pocket expenses incurred by the victim in filing charges or in cooperating in the investigation and prosecution of the offense.

Section 4. Type and time of payment -- defenses. (1) The court shall specify the amount, method, and time of payment or other restitution to the victim and may permit payment or performance in installments. The court may not establish a payment or performance schedule extending beyond the statutory maximum term of confinement that can be imposed for the offense.

(2) In determining the amount, method, and time of payment or other restitution, the court shall consider the financial resources and future ability of the offender to pay or perform. The court may provide for payment to a victim up to but not in excess of the pecuniary loss caused by the offense. The defendant may assert any defense that he could raise in a civil action for the loss sought to be compensated by the restitution order.

Section 5. Supervision of payment. The court may order a probation officer to supervise the making of restitution

INTRODUCED BILL
SB 237

and to report to the court any default in payment or other performance.

Section 6. Waiver or modification of payment. An offender may at any time petition the sentencing court to adjust or otherwise waive payment or performance of any part of any ordered restitution. The court shall schedule a hearing and give a victim to whom restitution was ordered notice of the hearing date, place, and time and inform the victim that he will have an opportunity to be heard. If the court finds that the circumstances upon which it based the imposition, amount, method, or time of payment or other restitution no longer exist or that it otherwise would be unjust to require payment or other restitution as imposed, the court may adjust or waive unpaid or unperformed restitution or modify the time or method of making restitution. The court may extend the restitution schedule, but not beyond the statutory maximum term of confinement that may be imposed for the offense.

Section 7. Default. (1) If an offender sentenced to make restitution is in default for 60 days, the sentencing court, upon the motion of the prosecuting attorney or a victim or upon its own motion, may issue an order under 46-18-203 requiring the offender to show cause why he should not be confined for failure to obey the sentence of the court. The court may order the offender to appear at a time,

date, and place for a hearing or issue a warrant for his arrest. The order or warrant must be accompanied by written notice of the offender's right to a hearing and the rights and procedures applicable thereto. The procedures and rights of the offender at the hearing are the same as those applicable to a hearing under 46-18-203 to revoke a suspended or deferred sentence.

(2) Unless the offender shows that his default was not attributable to an intentional refusal to obey the sentence of the court or to a failure on his part to make a good faith effort to obtain the necessary funds for payment or otherwise perform the ordered restitution, the court may take any action provided for in 46-18-203. If confinement is ordered, the court may provide in the order that payment or satisfaction of the restitution order at any time entitles the offender to his release from confinement. The court, after entering the order, may at any time, for good cause shown, reduce the term of confinement and waive satisfaction of the restitution order.

(3) If restitution is imposed on an organization, it is the duty of any person authorized to order the disbursement of assets of the organization and his superiors to pay the restitution from assets of the organization under his control. Failure to do so renders such a person subject to subsections (1) and (2) if he was found guilty of the

offense and subject to a contempt of court order if he was not found guilty of the offense.

(4) An order to pay restitution constitutes a judgment rendered in favor of the state, and following a default in the payment of restitution or any installment thereof, the sentencing court may order the restitution to be collected by any method authorized for the enforcement of other judgments for money rendered in favor of the state.

Section 8. Rights of crime victims' reparation fund. (1) Whenever a victim is paid by a crime victims' reparation fund for loss arising out of a criminal act, the fund is subrogated, to the extent of the fund's payment to the victim, to the rights of the victim to any restitution ordered by the court and to any funds paid into a trust in lieu of a fine to satisfy civil judgments.

(2) The rights of a crime victims' reparation fund are subordinate to the claims of multiple victims who have suffered loss arising out of multiple offenses by the same offender or arising from any transaction which is part of the same continuous scheme of criminal activity of an offender.

Section 9. Civil actions by victim. (1) [Sections 1 through 9 do] not limit or impair the right of a victim to sue and recover damages from the offender in a civil action.

(2) The findings in the sentencing hearing and the

fact that restitution was required or paid are not admissible as evidence in a civil action and have no legal effect on the merits of a civil action.

(3) Any restitution paid by the offender to the victim must be set off against any judgment in favor of the victim in a civil action arising out of the facts or events which were the basis for the restitution. The court trying the civil action shall hold a separate hearing to determine the validity and amount of any setoff asserted by the defendant under this section.

Section 10. Codification instruction. Sections 1 through 9 are intended to be codified as an integral part of Title 46, chapter 18, part 2, and the provisions of Title 46 apply to sections 1 through 9.

-End-

CONSIDERATION OF SENATE BILL 237: Senator Halligan, sponsor of this bill, explained that it was prompted by the Montana Supreme Court case of State v. Morgan (Exhibit "C"). Courts currently have no direction to follow for the collection of restitution for victims. SB237 would provide procedures for restitution as a condition of a defendant's suspended or deferred sentence. This bill was drafted using the Model Sentencing Directives Act as a guideline. It specifically addresses victims of property crimes and crimes against the person and would require the offender to pay restitution.

PROPONENTS: Representative Asay testified in support of the bill and concurred with Senator Halligan's statements. He is concerned about the restitution process and feels the legislature needs to take some action.

Representative Swift also supported SB237 and felt it would help deter future crimes if an initial offender was required to make restitution.

Curt Chisholm, representing the Department of Institutions, stated that this bill would make a defendant responsible for his action. He did express some concern with the wording of the bill in relation to probation officers and how they will be used. He questioned if these officers would be assigned to determine damages and felt this would be inappropriate to their role. He also questioned if the officer would be responsible for the collection of the restitution money.

John Maynard, representing the Attorney General's Office, supported the need for this legislation. He advised that Montana law provides for restitution, but does not define "victim" or "damages." He felt that the legislature is in a position to adopt standards to give the courts direction. A copy of the Sentence Corrections Act was distributed to the Committee (Exhibit "D"). It was John Maynard's opinion that the bill intends for a probation or parole officer to act in a supervisory capacity by obtaining damage reports and submitting these estimates to the court through their presentence investigation report, and does not intend that the officer actually collect the money. He also though that the officer would supervise the payments of restitution as he would any other condition of a sentence imposed on a defendant. He also distributed an article from the "Independent Record" (Exhibit "E") describing a restitution program.

Cathy Campbell, representing the Montana Association of Churches, also spoke in support of this bill and submitted her written testimony (Exhibit "F").

Maxine Homer, representing the League of Women Voters, wished to go on record as a proponent to SB237.

There being no further proponents, and no opponents, the hearing was opened to questions from the Committee.

Chairman Turnage expressed concern that the bill was limited to special damages. He also questioned if a victim could recover damages twice -- once in a civil action and once by restitution.

Senator Mazurek expressed concern that county attorneys would be trying cases with civil issues and standards rather than criminal. Senator Crippen questioned the default provisions and if satisfaction of restitution would provide for a defendant's release. John Maynard assured the Committee that all the provisions of the bill were subject to due process laws. Senator Crippen questioned if other assets of the defendant's could be seized and utilized to pay restitution. He was advised that all procedural safeguards would apply to the new law. Representative Asay advised that a defendant would also have adequate access to the court to review sentencing.

Chairman Turnage asked if this would apply to the Justice Courts. John Maynard advised him it would. Chairman Turnage felt this could put the Justice of the Peace in a position of ordering a probation officer around. He also questioned if the defendant would have equal opportunity to challenge the findings of the probation officer and expressed concern about the equality of opportunity. John Maynard advised that the defendant would have counsel present if there was a claim to dispute and that this law will give enforceable standing to restitution.

Chairman Turnage felt there was a need to define who is a victim. Senator Halligan advised that he would propose an amendment to do this. He then closed by saying the major intent of this bill is to deter an initial offender from committing future crimes and to give the courts procedures to follow for the imposing of restitution on sentences.

ADJOURN: There being no further business before the Committee, the meeting was adjourned at 11:58.

Jean A. Turnage

JEAN A. TURNAGE
Chairman, Judiciary Committee

ROLL CALL

JUDICIARY COMMITTEE

48th LEGISLATIVE SESSION - - 1983 Date 2-1-83

NAME	PRESENT	ABSENT	EXCUSED
Berg, Harry K. (D)	✓		
Brown, Bob (R)	✓		
Crippen, Bruce D. (R)	✓		
Daniels, M. K. (D)	✓		
Galt, Jack E. (R)	✓		
Halligan, Mike (D)	✓		
Hazelbaker, Frank W. (R)	✓		
Mazurek, Joseph P. (D)	✓		
Shaw, James N. (R)	✓		
Turnage, Jean A. (R)	✓		

Each day attach to minutes.

DATE February 1, 1983

COMMITTEE ON Judiciary BILL NO. [illegible]

VISITOR'S REGISTER

NAME	REPRESENTING	Check One: Support	Check One: Oppose
[illegible]	Montana Association of Churches	237	
Jon Metcalfe	MHIAM, Bd. of Visitors, Pt. A Hlth		225
[illegible]	[illegible] Reporters Assn.	196	
Marlene B. Jordan	Montana Shorthand Reporters' Assoc.	196	
Robert D. Wiebner	Montana Shorthand Reporters Assn.	196	
Jerry Hartmann	" " " "	196	
Tom Olson	Boys Ranch	237	
Jerome Anderson	Montana Shorthand Reporters Assn.	SB [illegible] 196	
Janice VanRiper	Dept of Workers' Compensation - 237		
M. L. [illegible]	Supreme Court		
Bessie Swift	Dept 91 - Administration	237	
MAXINE HOMER	LWV	237 220	
LIZ CHISHOLM	INSTITUTIONS	237 LEAGUED 220	
Nick RATENNA	" "	220 237	
John Maynard	Attorney General	237	
Hank Risley	MSP	220	

(Please leave prepared statement with Secretary)

EXHIBIT "C"
February 1, 1983

Gallatin, Joseph B. Gary, J., of negligent homicide and he appealed. The Supreme Court, Weber, J., held that: (1) defendant's physical condition after the accident was serious enough as determined by his doctor to render him incapable of refusing to consent to a blood-alcohol test; (2) the prosecutor's statement to the jury regarding the legal rate of intoxication, made despite the trial court's explicit holding that the jury should not be informed of the legal rate of intoxication, was improper, but was not prejudicial; and (3) the court had the power to order the defendant to make restitution to the survivors of the accident in the amount of their out-of-pocket losses for medical expenses.

Affirmed in part and vacated in part.

Haswell, C. J., and Shea, J., filed opinions concurring and dissenting.

1. **Automobiles** ⇐144.1(1)

Defendant's injuries sustained in automobile accident were serious enough to render him incapable of refusing consent to blood test, even though he was conscious and apparently coherent, where physician thought that defendant was in such serious condition that he would not allow police officer to talk with defendant. MCA 61-8-402(2).

2. **Criminal Law** ⇐717

In prosecution for negligent homicide arising out of defendant's involvement in automobile accident after he had been drinking, prosecutor's repeated references to "legal rate of intoxication" of .10% of blood alcohol, made despite trial court's specific holding that jury would not be instructed as to presumed level of intoxication, was unacceptable and improper, but did not deny defendant a fair trial where there was sufficient evidence as to what defendant's .17% blood-alcohol level meant.

3. **Criminal Law** ⇐1208(4)

In prosecution for negligent homicide arising out of defendant's involvement in automobile accident in which two persons

The STATE of Montana, Plaintiff and Respondent,

v.

Karl W. MORGAN, Defendant and Appellant.

No. 81-183.

Supreme Court of Montana.

Submitted Feb. 22, 1982.

Decided June 18, 1982.

Defendant was convicted in the Eighteenth Judicial District Court, County of

were killed, trial court had power to order defendant to make restitution to survivors of accident to compensate them for their injuries. MCA 46-18-201(1)(a).

4. Criminal Law ⇐1208(4)

Restitution may be allowed by payment of money equivalent to loss resulting from property taken, destroyed, broken, or otherwise harmed, and also out-of-pocket losses such as medical expenses. MCA 46-18-201.

5. Criminal Law ⇐1208(4)

Restitution due auto accident survivors from defendant convicted of negligent homicide was measureable by their out-of-pocket losses for medical expenses, but not in excess of actual money equivalent. MCA 46-18-201.

6. Criminal Law ⇐1208(4)

Court may not sentence defendant to pay restitution unless defendant is or will be able to pay and, in determining amount and method of payment, court shall take into account financial resources of defendant and nature of burden that payment of restitution will impose. MCA 46-18 201.

7. Criminal Law ⇐996(1.1)

Defendant who has been sentenced to restitution and who is not in default in payment thereof may at any time petition court that sentenced him for remission of payment of restitution or of any unpaid portion thereof and, if it appears to satisfaction of court that payment of amount due will impose manifest hardship on defendant or his immediate family, court may remit all or part of amount due in restitution or modify method of payment. MCA 46-18-201.

McKinley Anderson argued, Bozeman, for defendant and appellant.

Mike Greely, Atty. Gen., Mike McGrath, Asst. Atty. Gen., argued, Anne Sheehy, Helena Intern, argued, Donald E. White, County Atty., Robert Throssell, Deputy County Atty., argued, Bozeman, for plaintiff and respondent.

WEBER, Justice.

Defendant Karl Morgan appeals from a conviction of negligent homicide following a trial before a jury in the Eighteenth Judicial District, Gallatin County. He presents the following issues for review:

(1) Whether the motion to suppress the evidence of the defendant's blood alcohol test should have been granted.

(2) Whether the County Attorney's statement to the jury regarding the legal rate of intoxication in Montana, which was not included in the instructions to the jury, was prejudicial to the defendant.

(3) Whether the court has the power to order the defendant to make restitution to the survivors of the accident.

We affirm in part, vacate and remand in part.

On August 12, 1980, Karl Morgan left work about 5:00 P.M. and went to the MSU gym where it was his custom to workout and take a sauna. Morgan left the gym between 6:00 and 6:30 P.M. and on his way home stopped at a Bozeman bar, the Cat's Paw. He testified that he drank four drinks of scotch and water. After 7:30 P.M. he left the bar and started for home, westbound on old Highway 10.

Between 7:00 and 8:00 P.M., Holly Clarkin, her mother and father, her niece, and her niece's friend left Belgrade, Montana, to go shopping in Bozeman. Dark clouds had massed in the summer sky and it looked like rain. The Subaru Holly Clarkin was driving approached Bozeman in the eastbound lane of old Highway 10.

Karl Morgan recalled turning on his headlights as he was about to enter a storm and then a yellow flash. The next thing he remembered was an ambulance attendant standing beside his car.

Highway Patrolman Robert Koch was called to the scene at 7:55 P.M. Officer Koch found Morgan seated behind the wheel of his Dodge with the windshield shattered and the door sprung open. In response to questions, Morgan gave only a blank stare. Officer Koch also found that Holly Clarkin's mother and father, Pauline

and Edwin Clarkin, were dead and that the other occupants of the Clarkin vehicle had received serious injuries.

After finishing his investigation of the accident, Officer Koch went to Bozeman Deaconess Hospital to obtain blood from Morgan to determine the alcohol content thereof.

Morgan was taken first to the emergency room and then to the intensive care unit. Morgan's brother Jerry testified that he was with his brother in the intensive care unit between 9:00 and 9:30 P.M. and that he had about a five minute conversation with him. At around 9:30 P.M. Jerry Morgan was asked to leave to permit the medical staff to work on the patient.

It was during this period, at 9:55 P.M., that Officer Koch arrived. When Morgan was located, he was being treated in the intensive care unit where he lay with his eyes closed, I.V. tubes issuing from his body, and a nurse was in attendance. Observing the gravity of the situation, Officer Koch sought the doctor in charge, Dr. Newsome, to inquire about Morgan's condition, to ask if he could speak to Morgan, and to determine if the doctor would authorize drawing a blood sample.

According to Officer Koch's testimony he asked the doctor "if Mr. Morgan was conscious, if he was able to understand if I would place him under arrest and advise him of the implied consent law of the State of Montana; and at that time the doctor said 'he would not be able to understand. He is unconscious.'" The doctor authorized a nurse to draw blood, which she did and gave to Officer Koch. Koch made no attempt to talk to Morgan.

Dr. Newsome testified that Morgan was coherent and conscious and that he did not appear to be intoxicated. Dr. Newsome further testified that he talked to the officers, and authorized the drawing of a blood sample, but "wouldn't allow them (officers) to speak with him (Morgan) just at that time."

The blood sample was sent to the State Investigation Laboratory for analysis. The results showed a blood alcohol content of 0.17%.

I.

[1] Whether the motion to suppress the evidence of the defendant's blood alcohol test should have been granted.

Section 61-8-402, MCA, provides:

"(1) Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent, subject to the provisions of 61-8-401, to a chemical test of his blood, breath, or urine for the purpose of determining the alcoholic content of his blood if arrested by a peace officer for driving or in actual physical control of a motor vehicle while under the influence of alcohol. The test shall be administered at the direction of a peace officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle upon the public highways of this state while under the influence of alcohol. The arresting officer may designate which one of the aforesaid tests shall be administered.

"(2) Any person who is unconscious or who is otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn the consent provided by subsection (1) of this section.

"(3) If a person under arrest refuses upon the request of a peace officer to submit to a chemical test designated by the arresting officer as provided in subsection (1) of this section, none shall be given . . ."

When Morgan's blood was taken, he was neither under arrest nor had he been given an opportunity to withdraw his consent. The taking of the blood could still have been proper, however, if either of the situations in 61-8-402(2) occurred. The testimony of Morgan, his brother, and the attending physician indicate that Morgan was conscious, so for the taking of the blood sample to have been proper, Morgan must have been "in a condition rendering him incapable of refusal."

to what .17% alcohol meant. If we found that the County Attorney's statements could have reasonably affected the verdict, we would have reversed without hesitation. Although the County Attorney's statements were improper, the evidence already admitted was so extensive that the defendant was not prejudiced.

III.

[3] Whether the court has the power to order the defendant to make restitution to the survivors of the accident.

Sentencing of Morgan was deferred for three years with certain conditions including that he serve 60 days in jail on a work release program and make payments to the accident survivors. The District Court in paragraph 5 of its judgment dated January 19, 1981, ordered in part:

"That the defendant is to make restitution upon his release from the county jail to the Clerk of the District Court for the Eighteenth Judicial District in the amount of $75.00 per month. The first payment shall be April 5, 1981 and on the 5th of each month thereafter for a period of three (3) years from the date of this sentence. Said restitution is to be distributed among Mary Janelle Saltz, Holly Clarkin and Rhonda VanDiest."

Section 46-18-201, MCA, provides the type of sentences that a District Court can impose. Section 46-18-201(1)(a) provides for deferment of sentencing with conditions such as the one received by Morgan.

"(1) Whenever a person has been found guilty of an offense upon a verdict or a plea of guilty, the court may:

"(a) defer imposition of sentence... The sentencing judge may impose upon the defendant any reasonable restrictions or conditions during the period of the deferred imposition. Such reasonable restrictions or conditions may include:

"...

"(iv) restitution."

In providing for the use of restitution where a court defers imposition of sentence, the State of Montana is following the trend of criminal sanctions in the United States. As stated in the American Bar Association Standards for Criminal Justice (2d ed. 1980) at 18.112-113:

"The sanction of restitution is currently receiving unprecedented legislative and scholarly attention, as the focus of criminal justice reform has begun to shift to the victim of the crime. A 1978 survey found that some sixteen states had either enacted restitution legislation during 1976-1977 alone or had pending in their legislatures bills that would establish some mechanism by which offenders would make good the losses caused their victims. More than fifty localities have undertaken experimental programs involving restitution, and a new form of penal institution has come into use—the restitution shelter at which the offender resides while 'working off' the offense."

We agree with the conclusion set forth in the ABA Standards at 18.114-115 regarding the class of persons covered and the limitation to actual damages:

"Basically, case law has established that to be eligible to receive restitution, a claimant must be within the class of persons injured by the crime... A second well recognized limitation is that restitution must not exceed the actual damages or loss caused by the offender."

The defendant argues that the three girls injured in the collision do not fall within the class of persons injured by the crime. He bases his argument on *State v. Stalheim* (1976), 275 Or. 683, 552 P.2d 829. In *Stalheim* the wife and daughter of the plaintiff were killed in an accident. The plaintiff was not personally involved in the accident, but sought damages for the loss of both his wife and daughter. The Oregon statute provided that a defendant shall make "restitution to the aggrieved party." The Oregon court did not allow restitution and construed "aggrieved party" to refer to the direct victim of the crime, and not to other persons who suffer loss because of the victim's death or injury. The ABA Standards at 18.114-115 provide with regard to the claimants as follows:

"As to the breadth of this class, courts have disagreed, although both sides of the debate recognize that a remoteness standard should be employed to disqualify some claimants whose injuries can be said to have resulted from the defendant's conduct under a purely 'but for' test... Traditionally, the claimant had to be named in the indictment [*Karrell v. U. S.*, 181 F.2d 981 (9th Cir. 1950)], and restitution could only be awarded with respect to those counts in a multicount indictment that resulted in conviction [*U. S. v. Follette*, 32 F.Supp. 953 (E.D.Pa. 1940); *People v. Funk* [117 Misc. 778], 193 N.Y.S. 302 (1921)]. More recently, courts have split on whether restitution might be ordered with respect to counts that did not result in conviction but were dropped as a result of plea bargaining [*U. S. v. Buechler*, 557 F.2d 1002 (3rd Cir. 1977); *U. S. v. Landay*, 513 F.2d 306 (5th Cir. 1975)]. It is not the function of these standards to resolve these questions, but their existence shows the need for special legislative attention to the topic of restitution..."

While the Montana statute providing for restitution does not specifically address this problem, "The Crime Victim's Compensation Act of Montana" adopted in 1977 does give helpful guidance. That Act defines "victim" as follows:

"(6) 'Victim' means a person who suffers bodily injury or death as a result of:

"(a) criminally injurious conduct;

"(b) his good faith effort to prevent criminally injurious conduct; or

"(c) his good faith effort to apprehend a person reasonably suspected of engaging in criminally injurious conduct." Section 53-9-103(6), MCA.

Under that Act a person who has suffered as a result of criminally injurious conduct is classed as a victim, without a relationship to a crime for which a conviction was obtained. That is a persuasive approach. We hold that the three girls in the vehicle fall within "the class of persons injured by the crime," making restitution proper.

As above-mentioned, the second limitation is that restitution must not exceed the actual damages. The record here does not show the actual damages caused to each of the three girls, and we are not able to determine if the restitution could exceed the actual damages.

[4, 5] Unfortunately, our statutes do not give significant guidance to the District Court as to the manner in which restitution is to be applied and as to the limitations which are applicable. The Uniform Law Commissioners Model Sentencing and Corrections Act (1979), U. S. Department of Justice, does set forth in considerable detail various of these factors to be applied in the application of the restitution theory. We now conclude that restitution may be allowed by payment of the money equivalent of loss resulting from property taken, destroyed, broken, or otherwise harmed, and also out-of-pocket losses such as medical expenses. (*See* section 3-601 of the Model Sentencing and Corrections Act.) In this case, the District Court may provide for payments to those suffering out-of-pocket losses for medical expenses, but not in excess of the actual money equivalent.

The District Court did not indicate the out-of-pocket expenses or losses for which restitution was being made, nor did it determine the amount of the losses as to each of the three recipients. It is not possible for this Court to determine if the order of restitution was proper.

[6, 7] We vacate that part of the sentence which requires payment of money and remand to the District Court for resentencing on that point. The District Court should hold such additional hearing as may be necessary, and set forth in written findings its basis for the restitution order. Unfortunately, the statutes do not set out standards to be applied on restitution awards similar to those on costs which are set out in section 46-18-232, MCA, as follows:

"(2) The court may not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of pay-

ment of costs, the court shall take into account the financial resources of the defendant and the nature of the burden that payment of costs will impose.

"(3) A defendant who has been sentenced to pay costs and who is not in default in the payment thereof may at any time petition the court that sentenced him for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or his immediate family, the court may remit all or part of the amount due in costs or modify the method of payment."

We find the foregoing standards are reasonable standards for application to restitution payments. The District Court should apply the foregoing provisions to the present fact situation. In its findings the District Court should include sufficient facts to show compliance with the foregoing paragraphs.

Restitution is a theory being applied throughout the District Courts of Montana. Therefore, we suggest that it would be appropriate for the Montana Legislature to consider the various materials on restitution which are available, including the Model Sentencing and Corrections Act as well as the American Bar Association Standards for Criminal Justice, in order to determine if additional restitution provisions should be added to our statutes.

The judgment is affirmed with the exception of the vacation of that portion of the sentence requiring the defendant to begin making restitution upon his release from the county jail, in order that the District Court may take such additional steps as are necessary to comply with this opinion.

DALY, HARRISON and MORRISON, JJ., and GORDON BENNETT, District Judge,* concur.

HASWELL, Chief Justice, concurring in part and dissenting in part:

I concur with the majority that evidence of defendant's blood alcohol test is admissible and that the county attorney's statements were harmless error.

I dissent from the majority holding vacating the District Court's judgment and sentence requiring restitution. In my view the majority have written conditions and limitations on restitution on the basis of the Uniform Law Commissioners Model Sentencing and Corrections Act which has never been enacted in Montana. Additionally, the majority opinion denies the District Court judgment the presumption of regularity to which it is entitled by statute. Section 26 1 602(15) and (17), MCA.

The District Court is empowered to defer imposition of sentence on condition of restitution. No restrictions have been imposed on restitution although several legislative sessions have passed since 1973 where it was first statutorily authorized. See Chap. 513, Sec. 31, 1973 Session Laws; section 46 18 201(1)(a)(iv), MCA. On the other hand, the Uniform Law Commissioners Model Sentencing and Corrections Act imposes a variety of limitations on the sentencing court's authority to require restitution: a presentence report documenting the victim's pecuniary loss, limitations on what kind of losses are subject to restitution, the financial resources of the offender, etc. As I see it, this Court should be slow in limiting restitution by judicial decisions based upon Model Acts that have no counterparts in Montana.

I also object to vacating a judgment and sentence valid on its face because there is no underlying record which has been certified to us affirmatively showing the dollar amount of out of pocket expenses, the dollar amount of loss of each victim and related matters. This puts the shoe on the wrong foot. The burden is properly in the defendant to show error in the restitution order. Here the defendant has made no showing. Until he does, the District Court judgment and sentence should be upheld.

SHEA, Justice, concurring and dissenting:

Although I agree with the majority's decision on the restitution issue, I would order

* Sitting for SHEEHY, J.

a new trial because the prosecutor not only violated the trial court's order, but in doing so, he twice misstated the law to the jury. In addition, I feel that the Chief Justice, in his dissent to the restitution holding, has overlooked some basic reasons why a restitution order, to be acceptable, should be supported by the evidence.

In holding the prosecutor's violation of the trial court's order to be harmless error, the majority has simply issued a bland warning not to do it again. I feel that the only proper remedy in light of this flagrant violation of the court's order is to order a new trial. This is the only way in which the prosecutors will know that they cannot violate a trial court's order and the defendant's rights with impunity. The prosecutor's actions were designed to bring the information to the jury's attention which the court held could not be done.

Further, the information brought before the jury was incorrect. The prosecutor supplied the doctor and the jury with the forbidden information by asking the doctor if he was "familiar with the fact that .10 is the legal rate in Montana of intoxication." This information, couched in the form of a question, not only violated the court's order, but it was also incorrect. A .10 percent blood alcohol level is not the legal rate of intoxication in Montana; rather, it gives rise to a *presumption* that the defendant was under the influence of alcohol. (Section 61-8-401(3)(c), MCA.) The jury could well have believed, because of this misinformation that a .10 percent blood alcohol level means that a person, under Montana law, is intoxicated. And the prosecutor's final argument to the jury again pounded this point home by arguing that a .10 percent blood alcohol level was the "legal rate of intoxication in Montana" and that the defendant's blood alcohol count of .17 percent "is almost twice the legal rate of intoxication in the State of Montana under our laws."

It is insufficient for the majority to pass off these flagrant violations and misstatements of the law by a statement that ". . . there was already sufficient evidence in the testimony of Mr. Anderson as to what .17% alcohol meant. . . ." The undeniable fact is that the prosecutor not only twice violated the court's order but in doing so also misstated the effect in Montana of a .10 percent blood alcohol level. Because the prosecutor twice stated that a .10 percent blood alcohol level is the "legal rate of intoxication" in this state, the jury was left with the impression that as a matter of law, defendant was intoxicated. We have then two violations of a court order coupled with two misstatements of the law on which the prosecutor clearly intended the jury to rely. I cannot state, beyond a reasonable doubt, that these misstatements of the law did not contribute to the defendant's conviction. See *Chapman v. California* (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705. Therefore, I would vacate the judgment and order a new trial.

I feel some comment on the restitution issue is necessary because the dissent of Chief Justice Haswell seems to indicate that in imposing guidelines for restitution, this Court has arrogated to itself a power which belongs only to the legislature.

In permitting a district court to impose restitution as a condition of a deferred sentence (section 46-18-201(1)(a)(iv), MCA, the legislature has utterly failed to give any guidelines about when restitution is to be considered an option. The dissent suggests that only the legislature can provide guidelines for restitution, and that any district court judgment imposing restitution is protected by the disputable presumptions contained in section 26-1-602, MCA. Subsection 15 of this statute provides a disputable presumption "that official duty has been regularly performed." And subsection (17) provides a disputable presumption "that a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties." I have no quarrel with these presumptions but they do not address the problems involved here. Translated, these presumptions mean only that the party taking the appeal must convince at least a majority of this Court that the trial court was wrong. Or put another

way, it means that the party defending the appeal does not have the burden of going forward to establish that the judgment is correct.

I do not think the legislature intended that district courts order restitution in any amount they desire; I do think that the legislature would consider it a laudable goal to have an evidentiary record in support of any restitution ordered by the district court. Otherwise, an order would be nothing less than a fiat, based only on the personal predilections of the sentencing court. And certainly this Court, in the exercise of its appellate jurisdiction, has the right to determine whether an order of the sentencing court is supported by the evidence.

Restitution can be likened to a civil judgment for damages. Each element of damages must be supported by the evidentiary record. And so must each factor on which restitution is based. In permitting a trial court to order restitution, it can hardly be said that the legislature intended that the district court have plenary power to decide the issue without benefit of appellate review.

By analogy, the legislature has created a cause of action for wrongful death (section 27-1-513, MCA), but the elements of recoverable damages are not listed in this statute or in any other statute. Instead, this Court, by its decisions, has given meaning to the cause of action by setting forth in various decisions the items of damages that are recoverable. I see our function as being no different here, where we are simply setting forth the guidelines for district courts to follow when restitution is considered as a sentencing option. This Court has followed a clear, if unsteady, policy of requiring the sentencing courts to set forth their reasons for their sentences. Our failure to require sentencing courts to justify their sentences would eventually result in these courts never giving reasons for their decisions. These courts would simply fall back on the so-called presumptions of regularity contained in sections 26-1-602(15) and (17), MCA, as their justification for not explaining their decisions.

This Court was faced with the situation of determining not whether restitution was proper as a principle, but whether the amount of restitution was proper under the facts. As the majority opinion states: "The record here does not show the actual damages caused to each of the three girls, and we are not able to determine if the restitution could exceed the actual damages." Clearly, then, it is proper for this Court to remand for resentencing, and in doing so, to set forth guidelines for the district courts to use when ordering restitution. These guidelines will help the district courts, the public will have confidence that the function of restitution is not being abused, and these guidelines will certainly aid this Court in performing its function of appellate review.

Michael C. PREZEAU, Plaintiff and Respondent,

v.

The CITY OF WHITEFISH, Defendant and Appellant.

No. 81-424.

Supreme Court of Montana.

Submitted March 30, 1982.

Decided June 21, 1982.

City appealed from judgment entered in the District Court, Eleventh Judicial District, Flathead County, James M. Salansky, J., enjoining city from authorizing construction of indoor rifle range in public park until project was approved by majority of voters of city in special election. The Supreme Court, Sheehy, J., held that: (1) applicable statute commands that sale or lease of municipal property held in trust for specific purpose must be approved in election

Comment

The section authorizes but does not require the establishment of a released offender loan fund. Experience with such funds in many institutions has been disappointing. The provision is included to insure the availability of the authority to operate such a fund if the director of corrections believes it can be done successfully.

Library References

Prisons ⇐14. C.J.S. Prisons § 20.

PART 6. RESTITUTION

§ 3-601. [Sentence of Restitution.]

(a) A sentencing court may sentence an offender to make restitution to the victim of the offense.

(b) Whenever the court believes that restitution may be a proper sentence or the victim of the offense or the prosecuting attorney requests, the court shall order the presentence service officer to include in the presentence report documentation regarding the nature and amount of the victim's pecuniary loss.

(c) The court shall specify the amount and time of payment or other restitution to the victim and may permit payment or performance in installments. The court may not establish a payment or performance schedule extending beyond the statutory maximum term of community supervision that could have been imposed for the offense.

(d) In determining the amount and method of payment or other restitution, the court shall consider the financial resources and future ability of the offender to pay or perform. The court may provide for payment to the victim up to but not in excess of the pecuniary loss caused by the offense. The defendant is entitled to assert any defense that he could raise in a civil action for the loss sought to be compensated by the restitution order.

(e) For purposes of this section "pecuniary loss" means:

(1) all special damages, but not general damages, substantiated by evidence in the record, which a person could recover against the offender in a civil action arising out of the facts or events constituting the offender's criminal activities, including without limitation the money equivalent of loss resulting from property taken, destroyed, broken, or otherwise harmed and out-of-pocket losses, such as medical expenses;

(2) reasonable out-of-pocket expenses incurred by the victim resulting from the filing of charges or cooperating in the investigation and prosecution of the offense[.][; and]

[(3) interest on the amount of pecuniary loss from the time of loss until payment is made.]

(f) An insurer or surety that has paid any part of the victim's pecuniary loss is not a victim for purposes of obtaining restitution.

(g) The court may order a community-service officer to supervise the making of restitution and to report to the court a default in payment.

Comment

This section outlines the elements of a sentence to pay restitution to the victim of the offense. It reflects a growing recognition that the criminal justice system has tended to ignore the victim of the offense and the loss he has suffered. Indeed, other sanctions traditionally employed by the criminal law including fines and imprisonment deprive the victim of any realistic opportunity to recoup his loss from the offender. The interest of the victim is

increasingly being recognized and the use of restitution is being expanded. *See* Drapkin & Viano, Victimology: A New Focus (1973); Hudson & Galaway, Restitution in Criminal Justice 167 (1977) (cataloguing 19 active restitution projects in the United States). These programs tend to provide an active supervised form of restitution which includes employment counseling for the offender. In addition, many sentencing judges have imposed payment of restitution as a condition of probation. This Act lifts restitution to the status of a sentencing alternative in order to emphasize its importance and to encourage more careful consideration of its potential impact.

Most other national proposals have recommended that restitution be an authorized condition of probation. ABA, Probation, § 3.2 (1970); Model Penal Code, § 301.1; Proposed New Federal Criminal Code, § 3103. Several states have enacted detailed restitution provisions: Iowa Code Ann., § 789A.8 (1977) ("it is the policy of this state that restitution be made by each violator of the criminal laws to the victims of his criminal activities"). Pa.Const. Stat.Ann. tit. 18, § 1103 (1977).

Subsection (b) requires information relating to restitution to be included in the presentence report. This provides some advance notice to the defendant of the amount requested and allows time for him to contest the information in the sentencing hearing. Subsection (c) by authorizing installments over a limited time places a maximum on the amount of restitution that can be ordered. Subsection (d) makes clear that the ability of the offender to pay is a relevant consideration and in addition the amount to be paid is limited by the loss sustained by the victim. A limitation based on ability to pay may be constitutionally required. People v. Kay, 36 Cal.App. 759, 111 Cal.Rptr. 894 (1973); State v. Harris, 70 N.J. 586, 362 A.2d 32 (1976). The limitation is also included in the Maine and Iowa code provisions, *supra*.

One of the potential legal obstacles to a more extensive use of restitution is the conflict with the civil law system. The last sentence in subsection (d) authorizes the defendant to assert any defense he would be entitled to assert in a civil action brought by the victim for compensation. This seeks to limit the potential variance between civil liability and a restitution order.

Subsection (e) defines the type of loss that can be considered in awarding a restitution order. General damages, such as pain and suffering and disfigurement, are excluded. *See* Me.Rev. Stat.Ann. tit. 17-A, § 1204 (1975); Iowa Code Ann., § 789A.8(1)(b) (1977) (all damages recoverable in civil action "except punitive damages and damages for pain, suffering, mental anguish, and loss of consortium."). Paragraph (2) also authorizes reimbursement for reasonable out-of-pocket expenses resulting from the investigation. These expenses would include transportation, lost wages, etc., incurred in order to attend hearings, line-ups, or other investigatory proceedings. Paragraph (3) which authorizes interest on pecuniary loss is bracketed because of the variance among the states on the awarding of prejudgment interest in tort cases. The rule regarding interest should be the same both in tort and for purposes of restitution.

Subsection (f) precludes a surety or insurer from obtaining restitution through the criminal process. The section does not prevent such a party from asserting its contractual subrogation rights in a civil action against the defendant.

Subsection (g) authorizes the use of community-service officers to supervise the payment of restitution.

Library References

Criminal Law ⇐1220. C.J.S. Criminal Law § 2007.

§ 3-602. [Modification or Waiver.]

An offender at any time may petition the sentencing court to adjust or otherwise waive payment or performance of any ordered restitution or any unpaid or unperformed portion thereof. The court shall schedule a hearing and give the victim notice of the hearing, date, place, and time and inform the victim that he will have an opportunity to be heard. If the court finds that the circumstances upon which it based the imposition or amount and method of payment or other restitution ordered no longer exist or that it otherwise would be

unjust to require payment or other restitution as imposed, the court may adjust or waive payment of the unpaid portion thereof or other restitution or modify the time or method of making restitution. The court may extend the restitution schedule, but not beyond the statutory maximum term of community supervision that could have been imposed for the offense.

Comment

The section gives the court power to modify or waive payment of restitution if the economic condition of the defendant changes during the payment period. The provision is similar to Section 3-403 for fines, but with regard to restitution the section requires the victim be notified and be given an opportunity to be heard on the requested modification. This additional procedure reflects the victim's interest in the restitution order.

Library References

Criminal Law ⇐1220. C.J.S. Criminal Law § 2007.

§ 3-603. [Default.]

(a) If an offender sentenced to make restitution defaults for 60 days, the court upon the motion of the prosecuting attorney, the victim, or its own motion may issue an order requiring the offender to show cause why he should not be confined for failure to obey the sentence of the court. The court may order the offender to appear at a time, date, and place for a hearing or issue a warrant for his arrest. The order or warrant shall be accompanied by written notice of his right to a hearing and the rights and procedures applicable thereto. The procedures and rights of the offender at the hearing shall be the same as those applicable to a hearing to revoke community supervision.

(b) Unless the offender shows that his default was not attributable to an intentional refusal to obey the sentence of the court or to a failure on his part to make a good faith effort to obtain the necessary funds for payment, the court may order the offender to serve a term of periodic or continuous confinement not to exceed [—— years] if imposed for conviction of a felony or [—— years] if imposed for conviction of a misdemeanor. The term runs consecutively with any other term of confinement being served by the offender. The court may provide in its order that payment or satisfaction of the restitution order at any time will entitle the offender to his release from confinement or, after entering the order, at any time for good cause shown may reduce the term of confinement, including payment or satisfaction of the restitution order.

(c) The court shall comply with applicable guidelines of the sentencing commission and the provisions of Section 3-207 in imposing confinement for nonpayment of a restitution order.

(d) If restitution is imposed on an organization, it is the duty of any person authorized to order the disbursement of assets of the organization, and his superiors, to pay the restitution from assets of the organization under his control. Failure to do so renders a person subject to an order to show cause why he should not be confined.

(e) An order to pay restitution constitutes a judgment rendered in favor of the State and following a default in the payment of restitution or any installment thereof, the sentencing court may order the restitution to be collected by any method authorized for the enforcement of other judgments for money rendered in favor of the State.

Comment

The provision establishes provisions for nonpayment of a restitution order. They are identical to those enacted for nonpayment of fines except that the victim is given a greater role in the process. As in cases of nonpayment of

fines, once the fact of nonpayment is proved, the defendant has the burden to show that nonpayment is a result of his inability to pay or obtain funds to do so.

Subsection (c) makes applicable to a restitution order, the procedures available to collect money judgments rendered in favor of the State. These procedures usually give the State higher priority to a debtor's funds than would normally be given to a private party. This seems appropriate because the restitution order includes not only a compensatory element but is also part of the sentence imposed for the criminal offense.

Library References

Criminal Law ⇐1220. C.J.S. Criminal Law § 2007.

§ 3-604. [Victim's Compensation.]

(a) Whenever a victim is paid by a crime victim's reparation fund for loss arising out of a criminal act, the fund is subrogated to the rights of the victim to any restitution ordered by the court and to any funds paid into a trust in lieu of a fine to satisfy civil judgments.

(b) The rights of the crime victim's reparation fund are subordinate to the claims of victims who have suffered loss arising out of the offenses or any transaction which is part of the same continuous scheme of criminal activity.

Comment

This section coordinates payments to victims under a restitution order with payments by any public victim's compensation act. States without a victim's compensation fund may wish to remove this provision unless there are local funds that provide victims with compensation. Subsection (a) gives the fund a right of subrogation against any order of restitution to the extent the fund has paid the victim. Because of the length of many criminal proceedings, it may be appropriate for a fund to compensate the victim immediately. This subsection provides the fund with an incentive to do so rather than to wait to see if any money is paid under a restitution order.

Subsection (b) speaks to the problem of multiple victims and their relationship to restitution and a victim's compensation fund. The section gives victims priority over the fund in collecting funds from the defendant. Thus the subrogation right granted in subsection (a) is subordinate to the claims of other victims seeking restitution from the offender.

Library References

Criminal Law ⇐1220. C.J.S. Criminal Law § 2007.

§ 3-605. [Civil Actions.]

(a) This Act does not limit or impair the right of a victim to sue and recover damages from the offender in a civil action.

(b) The findings in the sentencing hearing and the fact that restitution was required or paid is not admissible as evidence in a civil action and has no legal effect on the merits of a civil action.

(c) Any restitution paid by the offender to the victim shall be set off against any judgment in favor of the victim in a civil action arising out of the facts or events which were the basis for the restitution. The court trying the civil action shall hold a separate hearing to determine the validity and amount of any set-off asserted by the defendant.

Comment

This section coordinates payments to victims under a restitution order with potential civil suits based on the same event. Although receiving restitution does not prevent the victim from bringing a civil action, amounts paid to the victim are set off against any award. This prevents the victim from

receiving double recovery and the defendant from paying for the same loss twice.

Subsection (b) insures that the judgment in the criminal proceeding that restitution is appropriate and the findings based thereon are not admissible in any civil litigation. The burden of proof at the sentencing hearing and the procedures applicable thereto including the type of evidence that can be considered is more flexible and less restricted than in civil litigation.

The last sentence in subsection (c) requires a separate hearing to determine the validity of any set off. This is to prevent the fact that restitution has been ordered from influencing the determination of liability or damages in the civil case.

Library References

Criminal Law ⇐1220. C.J.S. Criminal Law § 2007.

ARTICLE 4. TREATMENT OF CONVICTED AND CONFINED PERSONS

Prefatory Note

Article 4 is the legislative embodiment of a prescriptive code of treatment of offenders. It reflects an express assumption of the philosophy that "a prisoner retains all the rights of an ordinary citizen except those expressly or by necessary implication taken from him by law." Coffee v. Reichard, 143 F.2d 413 (6th Cir. 1944). *Accord, e. g.*, Morales v. Schmidt, 340 F.Supp. 544, 553–54 (W.D.Wis. 1972); United States *ex rel.* Wolfish v. United States, 428 F.Supp. 333 (S.D.N.Y. 1977) (opinion on motion for summary judgment). *Cf.* Procunier v. Martinez, 416 U.S. 396 (1974); Bounds v. Smith, 45 U.S.L.W. 4411 (1977). It is a philosophy supported by many authorities, and it is gaining increasing recognition by the courts. *See e. g.*, ABA Joint Comm. on the Legal Status of Prisoners, *Standards Relating to the Legal Status of Prisoners*, § 1.1 and Commentary (Tent.Dr.1977) *reprinted in* 14 Am.Crim.L.Rev. 377 (1977) [hereinafter cited as ABA Joint Comm.]; S. Kranz, R. Bell, & M. Magruder, Model Rules and Regulations on Prisoners' Rights and Responsibilities 1–4 (1977) [hereinafter cited as Kranz]; Nat'l Advisory Comm'n on Criminal Justice Standards & Goals, Corrections 17–21 (1973) [hereinafter cited as Nat'l Advisory Comm'n]. It has, moreover, been enacted into law in at least one state. Cal.Penal Code, § 2601 (West 1976) (a confined offender is "deprived of such rights, and only such rights, as is necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public").

The legislative recognition that a confined person generally retains the rights of a free citizen is by no means meant to deprecate the legitimate interests of institutional security and public safety. There is throughout Article 4 an affirmation that these security and safety interests are and must be of paramount importance. Article 4 represents the view that security and safety can be maintained consistent with the treatment of confined persons that is mandated or encouraged in the various sections. Thus, the Article describes a just—and safe—correctional system in which attention is paid to the societal interest in humane treatment of confined persons as well as to the personal interests of confined persons themselves in the treatment provided them. By so describing the system, it is believed that society will more nearly achieve the goal of every correctional system—to return to society confined persons who will adjust to the outside world and not recidivate. As was stated by the ABA Joint Committee:

> Virtually all prisoners will someday be released to a society in which . . . they will daily be required to make choices and exercise self-restraint. If our institutions of confinement do not replace self-restraint for compelled restraint, and encourage choice rather than rote obedience, released prisoners will continue to be unable to deal with the "real" world.

ABA Joint Comm. at 418–19.

Provision of rehabilitative programs and services is mandated throughout the Act. *See e. g.*, Section 2–105 *supra*. It is intended that confined persons will be encouraged to avail themselves of opportunities presented by these programs and services. And many of the provisions are clearly drafted to provide incentives to

FROM MONTANA'S CAPITAL

ECORd

THURSDAY

January 27, 1983
Helena, Montana
Vol. 40 No. 67

king criminals pay

ion program returning big dividends

EXHIBIT "E"
February 1, 1983

lar broke down and
ed a $77 "bill" for his
in the crime he'd

w would he ever pay?
and Clark County's
a solution. She in-
boy to come to the
nd collect soda cans

by nickel, the boy's
After many months,
he $89,730 that 251 of-

fenders paid their crime victims in 1982.

That's an 86 percent increase over the previous year and shows the success of the restitution program started in the First Judicial District youth court with a Board of Crime Control grant in 1978. It was expanded to include adults two years later.

A total of $206,044 has been returned to victims so far from the restitution program, and offenders have paid another $20,185 in fines and attorney's fees — more than half of that amount in 1982.

An estimated $26,000 in additional fines and restitution was collected in a separate effort by the county's two Justice of the Peace courts, and the city police court has its own collection system too.

And money is only half of the story. The district and youth court offenders in 1982 performed 972 hours of public service — everything from picking up trash on the downtown mall to helping the Salvation Army deliver holiday food to the needy.

Sey believes the work requirement spells an important message: "The court is not a revolving door any more. Public service gives credibility to the criminal justice system."

(More on CRIME, page 8A)

ACTION ON SENATE BILL 237: A "grey" bill was distributed and reviewed. Under the proposed amendments, a judge would have authority to impose restitution, but would not be required to do so. A definition is given to the word "victim" which is consistent with a recent supreme court interpretation. Also, all ambiguous language and the organization liability has been stricken. Senator Halligan discovered that the title should also be amended to refer to an offender rather than a perpetrator. Senator Daniels questioned if the bill provides for recovery of stolen property and was assured that it does. Senator Crippen was concerned about page 6, line 7 and the possibility that any assets of the defendant's may be subject to confiscation. Senator Halligan expressed the need for this provision in order to assure the defendant makes his restitution payments.

The Committee expressed concern about the method of collecting a judgment and thought that everything after "judgments" in line 8, page 5 should be stricken. Senator Halligan moved to amend page 6, line 7 of the "grey" bill to strike the remainder of the line after the word "judgments". This motion passed unanimously. Senator Halligan then moved to adopt the amendments as set out in the grey bill and to include the amendments passed as aforementioned. This motion passed unanimously. Senator Halligan moved SB237 DO PASS AS AMENDED. This motion also passed unanimously.

ADJOURN: There being no further business before the Committee, the meeting was adjourned at 11:45 a.m.

JEAN A. TURNAGE
Chairman, Judiciary Committee

ROLL CALL

JUDICIARY COMMITTEE

48th LEGISLATIVE SESSION - - 1983 Date 2-9-83

NAME	PRESENT	ABSENT	EXCUSED
Berg, Harry K. (D)	✓		
Brown, Bob (R)	✓		
Crippen, Bruce D. (R)	✓		
Daniels, M. K. (D)	✓		
Galt, Jack E. (R)	✓		
Halligan, Mike (D)	✓		
Hazelbaker, Frank W. (R)	✓		
Mazurek, Joseph P. (D)	✓		
Shaw, James N. (R)	✓		
Turnage, Jean A. (R)	✓		

Each day attach to minutes.

STANDING COMMITTEE REPORT

February 9, 19 83

MR. PRESIDENT

We, your committee on Judiciary

having had under consideration Senate Bill No. 237

Halligan

Respectfully report as follows: That Senate Bill No. 237

introduced bill, be amended as follows:

1. Title, lines 5 and 6.
   Strike: "PERPETRATORS OF CRIMES"
   Insert: "CRIMINAL OFFENDERS"

2. Page 1, line 10.
   Strike: "Sentence"
   Insert: "Condition"

3. Page 1, line 11.
   Strike: "sentence"
   Insert: "require"

4. Page 1, line 12.
   Following: "offense."
   Strike: remainder of line 12 through "restitution" on line 14.

Continued on Page 2

XXXXXXXX

JEAN A. TURNAGE, Chairman.

STATE PUB. CO.
Helena, Mont.

J.C.

5. Page 1, line 15.
Following: "los
Insert: "(1)"
Strike: "Whenev
Insert: "whenev

6. Page 1, line 17.
Strike: "sent he victim of the offense"
Insert: "condit a deferred or suspended sentence"

7. Page 1, line 19.
Strike: "a"
Insert: "the n officer to include in the"

8. Page 1, line 19.
Following: "re
Insert: ":"
Strike: the re r of line 19 and line 20 in its entirety.

9. Page 1.
Following: lin
Insert: "(a) d tation of the offender's financial resources and fu bility to pay restitution; and (b) documentatio of tha 's pecuniary loss submitted by the victim. (2) wi presentence report is authorized or requ ne court may receive evidence of the offen bility to pay and the victim's loss at the ti sentencing."

10. Page 1, line 22.
Following: "th 91),"
Insert: "the f g definitions apply: (1)"

11. Page 1, line 23.
Strike: "(1)"
Insert: "(a)"

12. Page 2, line 6.
Strike: "(2)"
Insert: "(b)"

13. Page 2.
Following: lin
Insert: "(2) " means:

Continued on Page 3

STATE PUB. CO.
Helena, Mont.

JEAN A. TURNAGE, Chairman.

13. (continued)
(a) a person who suffers loss of property, bodily injury, or death as a result of:
(i) criminally injurious conduct; or
(ii) his good faith effort to prevent criminally injurious conduct.
(b) an insurer or surety with a right of subrogation to the extent it has reimbursed the victim of the offense for his pecuniary loss."

14. Page 2, line 11.
Strike: "or other restitution"

15. Page 2, line 12.
Strike: "or performance"

16. Page 2, line 13.
Strike: "or performance"

17. Page 2, line 21.
Strike: "defendant"
Insert: "offender"

18. Page 3, line 5.
Strike: "or performance"

19. Page 3, lines 11 and 12.
Strike: "or other restitution"

20. Page 3, line 13.
Strike: "or other restitution"

21. Page 3, line 14.
Strike: "or unperformed"

22. Page 3, line 20.
Strike: "for 60 days"

23. Page 3, lines 21 and 22.
Strike: "or a victim"

24. Page 4, line 1.
Following: "hearing or"
Insert: ", if he fails to appear as ordered,"

25. Page 4, line 3.
Following: "hearing"
Strike: the remainder of line 3 through "under" on line 6.
Insert: "as provided in"

Continued on Page 4

JEAN A. TURNAGE, Chairman.

STATE PUB. CO.
Helena, Mont.

26. Page 4, lines 6 and 7.
Strike: "to revoke a suspended or deferred sentence"

27. Page 4, line 8.
Strike: "Unless the offender shows that his"
Insert: "If the court finds that the offender's"
Strike: "not"

28. Page 4, lines 9 and 10.
Strike: "to an intentional refusal to obey an order of the court or"

29. Page 4, lines 11 and 12.
Strike: "or otherwise perform"
Insert: "of"

30. Page 4, line 14.
Following: "ordered,"
Strike: remainder of line 14 through ". The" on line 16.

31. Page 4, line 20.
Strike: subsection (3) in its entirety.
Renumber: subsequent subsections

32. Page 5, line 8.
Strike: "for money rendered in favor of the state"

33. Page 5, line 9.
Strike: "reparation fund"
Insert: "compensation account"

34. Page 5, line 10.
Strike: "by a"
Insert: "from the"

35. Page 5, line 10 and 11.
Strike: "reparation fund"
Insert: "compensation account established in 53-9-109"

36. Page 5, line 11.
Strike: "fund"
Insert: "account"

37. Page 5, line 12.
Strike: "fund's"
Insert: "account's"

38. Page 5, line 14.
Following: "court"
Strike: remainder of line 14 through "judgments" on line 15.

Continued on Page 5

JUAN A. TURNAGE, Chairman.

STATE PUB. CO.
Helena, Mont.

39. Page 5, line 16.
Strike: "a"
Insert: "the"
Strike: "reparation fund"
Insert: "compensation account"

40. Page 6, line 5.
Strike: "judgment in favor of"
Insert: "pecuniary loss awarded to"

41. Page 6, line 8.
Strike: "hold a separate hearing to"

42. Page 6, line 9.
Strike: "validity and"

And, as so amended,

DO PASS

JEAN A. TURNAGE, Chairman.

STATE PUB. CO.
Helena, Mont.

Montana chose one option and they are stuck with it. He emphasized that, for the most part, it is uniform and he thought that Louisiana is the only state that has not adopted the Uniform Commercial Code.

REPRESENTATIVE CURTISS asked MR. MURDO if it was his opinion that Montana was at a disadvantage because of this lack of uniformity. He responded no, he thought they have uniform law along with the other states in the United States and the things that happen are a little different in Montana versus Wyoming, Idaho, North and South Dakota; those are 1972 amendments that they are talking about and some of those states have adopted those amendments; he did not think they were disadvantaged but, if they were Louisiana and did not have this law, they would be disadvantaged.

There were no further questions and the hearing on this bill was closed.

SENATOR MAZUREK indicated that REPRESENTATIVE RAMIREZ will carry this bill on the floor of the House.

SENATE BILL 237

SENATOR HALLIGAN, District 48, Missoula, stated that this bill provides a procedure for restitution to victims of crimes by the criminal offenders and a procedure upon default in payment of restitution; restitution is not a new conviction and is not a new sentence, but the supreme court about four months ago, dealing with a case wherein restitution was involved, indicated that there are no guidelines within the state of Montana in relation to restitution; so the supreme court suggested that the legislature look at the model corrections act and develop some model language that deals with the area of restitution; and that is exactly what this bill is. He explained some important areas in the bill.

REPRESENTATIVE ASAY, District 50, Forsyth, arose in support of this bill and said that, in visiting with a judge in his district, he indicated that there was definitely a need for a provision of the payment of restitution through

a court-appointed individual. He indicated that this bill will give the court the means to apply restitution and take care of many problems in the early stages.

BECKY FAIRCLOUGH, Director of the Cascade County Restitution Program, stated that she has come to realize how important the use of restitution is in the district court system. She thought that this bill was really important and she presented to the committee a letter she received from Andrea Bartelt, Director of PACE Program. See EXHIBIT A-1.

PENNY SEY, Restitution Officer for the First Judicial District, said that their most important concern is for the victim of the crime; they receive the investigative report; then they contact the victim; they assist him in filing a report; they help with filing with insurance companies; they complete the report to the court; they go with the victim to testify in behalf of the victim; and once restitution is ordered by the judge, they monitor the payments; if a defendant does not have a job, they secure employment for him or they get him into training or schooling.

CURT CHISHOLM, Deputy Director for the Department of Institutions, said that they agree in concept with the intent of the bill, but they wanted to point out that some of the language in section 5 turned up missing and they would like this amended back into the bill in order to clarify the supervision of payment and this needs to be broader than it is right now instead of just placing that responsibility on the probation officer. He also was concerned on pages 1 and 2, section 2, wherein they asked the probation officer to include in the presentence report some information that is suggested there and the reason they opposed this is because they did not think it was appropriate for the probation officer to become, in effect, insurance adjusters and have to make judgments on the amount of damage, make judgments on the ability to pay, etc. He indicated that they were hopeful that they could oversee that process, incorporate it into their presentence investigation, but not actually be responsible for making judgments on anyone's ability to pay or the amount of pecuniary loss.

JOHN MAYNARD, Assistant Attorney General for the state of Montana, testified that the Attorney General supports this bill wholeheartedly; that it is a concept whose time has come; but the problem with this bill is that it was initially drafted from a uniform act and that in justice court, they do not have probation officers, restitution officers, etc. He noted that in Great Falls the restitution officer, by mutual agreement, does service the needs of the justice court.

There were no further proponents and no opponents.

SENATOR HALLIGAN said there was a small technical amendment that should go on this bill in order to be in accord with the deferred sentencing bill, that has already passed.

REPRESENTATIVE HANNAH indicated that he would like the record to show that he was in support of this bill.

REPRESENTATIVE ADDY noted on page 6, line 2 and also section 8, page 6, that they are making it possible for a judgment to be obtained against a perpetrator in both of those sections and he wondered if that judgment is subject to the exemption against property that is claimed in bankruptcy - the kinds of property that is subject to any other judgments - things that are necessary to carry on a trade, etc. SENATOR HALLIGAN responded that the language in line 6 keys it into the other provisions of law and he thought the exemptions would apply as well.

REPRESENTATIVE JENSEN asked MS. FAIRCLOUGH if they have special funds where the funds flow in and out and those are authorized by the judge. She responded that she is employed by the district judge; her accounts are set up by the county; they have a cross-reference system so that her work can be checked.

REPRESENTATIVE JENSEN indicated that the guilty individual gives you money, it goes into the account, you write a check and then send it to the victim; and he asked how many accounts does she have right now. MS. FAIRCLOUGH replied that she has two accounts in Cascade County right now.

REPRESENTATIVE ADDY asked who would be the most appropriate official on a county-wide basis to handle this kind of program. MS. FAIRCLOUGH responded that they have the program and they are able to collect enough money that they even make a profit off that program for their county; and she would say that the best way to handle this is to have a person who is designated as a restitution officer that could handle it like a business - not a probation officer - but someone who would have time to give enough attention to this.

REPRESENTATIVE ADDY asked if she was saying that the duties of the person who handles the crime victim's compensation program would conflict a little with the duties of a restitution officer and that they would not fit hand-in-glove. He wondered why they could not put the same hat on one person. MS. FAIRCLOUGH responded that they are two different theories, i.e. the crime victims' compensation act allows for victims to be paid by a division of the Workmens' Compensation program; restitution is something totally different and they are coming out of two separate entitites. She thought that there might be conflict there.

REPRESENTATIVE CURTSS asked if she understood her to say that they were able to make a profit on this in Cascade County. MS. FAIRCLOUGH replied that they are now at that point; their program costs so much to operate; when they count their statistics for budgeting time, they count all the money they have put back into the court system; eventually when you collect contracts on court-ordered sentences, you are going to come out collecting more than the program costs the county even though all that money is not funneled directly into the judicial system of the county, it is funneled to the taxpayer of the county.

REPRESENTATIVE CURTISS asked how is that money apportioned to the victim of the crime. MS. FAIRCLOUGH replied that basically what they do is they find out what the loss is to the victim; they put that before the court; the court returns orders that the defendant pay so much to the victim; it is up to her to see that that money gets to the appropriate party and to make sure that that individual has that money coming; and they compensate 100 per cent, if possible, or whatever the court choses to order.

REPRESENTATIVE CURTISS asked if more can be actually assessed against the perpetrator of the crime than the actual damages. MS. FAIRCLOUGH replied that no, they cannot; that part of what she does is try to ascertain the amount of loss; she had a case where a truck was stolen; replacement cost of that truck was $15,000.00 - that was what the victim wanted - but you have to go by fair market value; and it was up to her to determine what fair market value was; the court chose to order only fair market value, not the assessment costs, so the victime got what his truck was worth, but he did not get a new truck. She testified that the court never orders more to a victim than is his actual loss.

REPRESENTATIVE CURTISS asked how is the funding for your department provided. MS. FAIRCLOUGH replied that she started on the Board of Crime Control for three years on a grant; then the county took over that grant and they sponsor and pay for the program out of the district court budget.

REPRESENTATIVE KEYSER asked if this bill applies mainly to felons. SENATOR HALLIGAN responded for both misdemeanors and felonies.

REPRESENTATIVE KEYSER noted on page 3, section 4, it says, "The court may not establish a payment schedule extending beyond the statutory maximum term of confinement"; and he wondered if they had a misdemeanor crime wherein the maximum would be sixty days or something like that, how would this work. SENATOR HALLIGAN replied that he will be allowed as much as two years for this restitution to be made.

REPRESENTATIVE JENSEN noted on page 1, line 20, under new section 2, it says, "condition of a deferred or suspended sentence" and he wondered if they meant deferred imposition of sentence or deferred prosecution of crime; and there are prosecutions which are deferred based on certain conditions. He asked if they should add the word, "prosecution". MR. MAYNARD responded that, as a practical matter, there may be cases in which that is the practice, but he did not know if that was authorized by current law and those are found at the conclusion of the criminal procedure code; and that is where restitution is authorized.

REPRESENTATIVE JENSEN questioned in a smaller county, who did she think should be the responsible party for the administration of these funds. MS. FAIRCLOUGH responded that probably the most logical for the collection would be the clerk of the court's office, because in a lot of cases, they are collecting money for child support and this type of thing and they are already bonded; however, they may not like to get involved in the part of determining loss and where this money goes.

REPRESENTATIVE ADDY commented that he heard Mr. Maynard say that many prosecutors do make restitution as a condition of deferred prosecution and they do it with a private agreement with the defendant rather than by an order of the court. MR. MAYNARD responded that he was not aware of any provision in law that addresses that and if they are ordering restitution, logically that would be the way that they are doing it; he was not aware of the fact that they do order restitution in deferred prosecution, but he would think that the prosecutor would say, in those instances, that he would defer prosecution on this if these things were done. He noted that there is a very elaborate deferred prosecution program in Billings and there are a number of conditions that they impose, but he didn't know if they ordered restitution.

REPRESENTATIVE ADDY commented the problem he has with that is that it seems to him that they may not have enough leverage to be able to enforce the restitution if they do not have the equivalent of a judgment from the court. He wondered if they really want to have a real active restitution program premised upon deferred prosecution. It would seem better to him to get the judgment of the court first and then deferred imposition of sentence. MR. MAYNARD replied that that is all that is addressed by this bill is deferred imposition of sentence.

REPRESENTATIVE IVERSON said that it bothered him if they are talking about restitution prior to establishing guilt.

There were no further questions and the hearing on this bill closed. Senator Halligan noted that Representative Asay will carry this bill on the floor of the House.

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

BILL SENATE BILL 237 DATE March 21, 1983

SPONSOR SENATOR HALLIGAN

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
Betty Farrow	Great Falls	Cascade County Restitution Program	X	
Bernard Ley	Helena	Lewis & Clark Co. Restitution	X	
[illegible]	HELENA	STATE DEPT OF [illegible]		

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

FORM CS-33
1-83

PACE SKYLINE CENTER - 3300 Third Street NE, Great Falls, Montana 59404

March 10, 1983

Exhibit A

3-21-83
SB 237

Becky Fairclough
Restitutions Department
CASCO Building
Great Falls, MT 59401

Dear Becky:

Thank you for agreeing to be a resource speaker at our PACE Creative Problem-Solving Workshop on March 22 and 23. The workshop will be held at the Memorial Youth Center, 801 Second Avenue North. You will be working with students from 9:00 to 11:30 a.m. both days.

The topic is "Is There Justice in the Law?" and will focus on justice from the perspective of the victim, the criminal and society. Please respond to the topic from your perspective. You will first speak for five minutes as a member of a panel. Following the panel, the students will rotate to you for a series of question/answer sessions. Please interact with them in whatever way you feel will encourage the exchange of ideas.

Here is the morning schedule:

8:00 -	8:20	Registration
8:20 -	8:30	Welcome
8:30 -	8:50	Keynote Address, Judge William Coder
8:50 -	9:00	Introduction of Panel and Coaches
9:00 -	9:30	Panel: Father Gregori, moderator; Becky Fairclough; Mike Gersack; Tom McKittrick; Mike Smartt
9:30 -	9:45	Break
9:45 -	11:25	FACT FINDING: Question/Answer Sessions (five 20-minute sessions of approximately 20 students)
11:25 -	12:00	Fact Finding Summary (Teams & Coaches)
12:00 -	12:30	Lunch

Lunch will be served at noon and we invite you to join us as our guest. Please call the PACE Office, 791-2270 if you will be able to stay.

Thank you again for sharing your time and knowledge with us. You will be an integral part of the FIRST step of the Creative Problem-Solving Process.

Sincerely,

Andrea Bartelt

Andrea Bartelt, Director
PACE Program

AB:ls

MINUTES OF THE JUDICIARY COMMITTEE
March 22, 1983

The meeting of the House Judiciary Committee was called to order by Chairman Dave Brown at 9:07 a.m. in room 224A of the capitol building, Helena, Montana. All members were present as was Brenda Desmond, Staff Attorney for the Legislative Council.

EXECUTIVE SESSION

SENATE BILL 237

REPRESENTATIVE JENSEN moved that this bill BE CONCURRED IN. The motion was seconded by REPRESENTATIVE BERGENE.

CHAIRMAN BROWN passed out copies of proposed amendments that were discussed with Senator Halligan. He said that Senator Eck was here relating to her bill, SB 391, in case there were any questions that the committee wished to ask.

REPRESENTATIVE CURTISS indicated that she had some real problems with one of the remarks that was made yesterday wherein she said that they are now making a profit off that program for Cascade County, and she did not understand how they could be making a profit if the restitution is to be made to the victims of the crime, how they could have anything left over for the county.

REPRESENTATIVE JENSEN replied that he asked them and they said that they were making a little on short term interest; when they receive funds before the distribution of those funds, they accrue some money in those funds for a few days and they are interest-bearing funds and that is the only excess revenue that they have. He said that he did not get any figures from her, but apparently it is not all that much money. He felt that if they were going to have some money sitting in a bank account, they should draw some interest.

REPRESENTATIVE BERGENE stated that this reduces the cost that the county has.

REPRESENTATIVE CURTISS wondered if this bill mandates that one of these restitution officers be set up in all of these counties. She noted that they were apparently able to do that in some of the counties now, but she wanted Ms. Desmond to resond to this.

MS. DESMOND replied that her interpretation of the bill is that it does not affect the county's authority to set up a county restitution program especially with the amendments that Senator Halligan proposed, which say the supervision of the restitution may be done by any other designated person. She thought this would mean that the county could have someone else do it, such as a clerk in a J.P. court.

REPRESENTATIVE FARRIS indicated that she did not understand the amendments on pages 3 and 4; there are other kinds of restitution than cash; the Voluntary Action Program in Great Falls has a whole program wherein people, who do not have money and don't want to go to jail, can do public service; and she did not know if this bill addresses that kind of thing or not. She wondered why close the door to other kinds of restitution,

MS. DESMOND responded that she thought it was because this bill only deals with restitution to the victim; and that restitution, under the existing law, could include those things they are talking about.

REPRESENTATIVE FARRIS felt that this changes the existing language - this doesn't change anything else; on lines 14 and 16 on page 3, she noted that it crossed out "or other restitution: and "or performs"; and she wondered if this was not already existing language. MS. DESMOND replied that this is existing language in this bill, but that is not existing language in 46-18-201.

REPRESENTATIVE FARRIS said that this whole bill is all new language then. The response was yes.

REPRESENTATIVE JENSEN stated that there are a couple attorneys' opinions; he did not know if there was an attorney general's opinion or not, that muddies the water. He explained that the judge will order someone to do some work to provide for restitution; then someone came up with the idea that if that were the case whereby employment was being forced on someone, then the county would have to pick up all the costs of that employment, such as unemployment insurance, workmen's compensation, etc.; and the Missoula County Attorney wrote an opinion that said yes, the county was responsible for any injury that might

arise to the worker out of any of his work done by the order of the court. He contended that there were a couple of counties - he thought Kalispell and one other - that were not willing to pay that money so they cannot assign someone to do the work.

REPRESENTATIVE FARRIS exclaimed that this was involuntary servitude.

B. LESLIE VINING, Senate Aide to Senator Eck, stated that in many of the smaller counties they do not have all these individuals to do the work and she explained the proposed amendments to the committee.

REPRESENTATIVE JENSEN commented that the last amendments refer to a bill that has already passed, which lengthens the time someone has to pay.

REPRESENTATIVE HANNAH moved the adoption of these amendments. The motion was seconded by REPRESENTATIVE CURTISS. The motion carried unanimously.

REPRESENTATIVE JENSEN moved that the bill BE CONCURRED IN AS AMENDED. REPRESENTATIVE KEYSER seconded the motion. The motion carried unanimously.

SENATE BILL 391

CHAIRMAN BROWN explained that the basic difference between these two bills is that this bill applies to all sentences, while Senator Halligan's bill applies to suspended or deferred sentences. He passed out amendments that were proposed for this bill. See EXHIBIT B.

REPRESENTATIVE ADDY moved that the bill BE CONCURRED IN. REPRESENTATIVE JENSEN seconded the motion.

REPRESENTATIVE BERGENE moved that the amendments be adopted. REPRESENTED FARRIS seconded the motion.

MS. VINING explained that on page 12, lines 3 through 25, this is the original language that is in the codes now except for two areas: in subsection (ii) where it says, "jail time not exceeding 90 days" is changed to 180 days to

STANDING COMMITTEE REPORT

March 22, 19 93

MR. SPEAKER:

We, your committee on JUDICIARY

having had under consideration SENATE Bill No. 237

Third reading copy (blue color)

A BILL FOR AN ACT ENTITLED: "AN ACT TO PROVIDE A PROCEDURE FOR RESTITUTION TO VICTIMS OF CRIMES BY THE CRIMINAL OFFENDERS AND A PROCEDURE UPON DEFAULT IN PAYMENT OF RESTITUTION."

Respectfully report as follows: That SENATE Bill No. 237

BE AMENDED AS FOLLOW:

1. Page 1, line 21.
Following: "OFFICER"
Insert: ", restitution officer, or other designated person"

2. Page 3, lines 11 and 12.
Following: "the"
Strike: "statutory" through "offense" on line 12.
Insert: "period for which the sentence has been suspended or deferred under 46-18-201"

3. Page 3, line 14.
Following: "payment"
Strike: "or other restitution"

AND AS SO AMENDED DO PASS

DAVE BROWN, Chairman.

COMMITTEE SECRETARY

STATE PUB. CO.
Helena, Mont.

March 22, 1993

4. Page 3, line 16.
Following: "pay"
Strike: "or perform"

5. Page 3, line 22.
Following: "officer"
Insert: ", restitution officer, or other designated person"

6. Page 3, lineS 23 and 24
Following: "payment"
Strike: "or other performance"

7. Page 4, lines 14 and 15.
Following: "the" on line 14.
Strike: "statutory" through "offense" on line 15.
Insert: "period for which the sentence has been suspended or deferred under 46-18-201"

AND AS AMENDED
BE CONCURRED IN

DAVE BROWN, Chairman.

STATE PUB. CO.
Helena, Mont.